SUPREME COURT, U. S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 119

LOUISE M. WISSNER AND LEANDOUS H. WISSNER,
Appellants,

vs.

MARGARET WISSNER,
Appellee

APPEAL FROM THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

HEARING DENIED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEE'S PETITION FOR REHEARING AFTER DECISION BY THE SUPREME COURT OF THE UNITED STATES.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the plaintiff and appellee and respectfully petitions this Court for a rehearing in the above entitled

cause on the grounds and for the reasons hereinafter set forth.

Introduction

If this matter involved only the destruction of the property rights of the appellee, we of course would not ask for a rehearing in this matter as the expense and burden of the litigation even up to the present time could not be justified by the amount involved in dollars and cents.

Since the decision of the Supreme Court in this case destroys, both now and for years to come, the rights of many women in the twelve community property states and Hawaii and badly confuses the law to be applied by the courts in the community property states where veterans insurance is under consideration, we feel that we are obligated to ask the court to reconsider this matter and to grant a rehearing for that purpose.

I may say at the outset that it is never a pleasant task to ask for a rehearing from any court as it is certain to necessitate criticism of the opinion rendered. Because of my belief that the Supreme Court of the United States is the greatest court in the world and because of my profound respect for the men who sit on that Court, this task is particularly unpleasant to me.

Although I endeavored to present this matter to the Court with all the ability I have, it becomes obvious from the majority opinion that I lacked the talent or ability to present the situation as clearly or intelligently as it should have been presented. Undoubtedly one of the weaknesses of the presentation that I made was my complete failure to recognize the fact that the members of the Court are quite unfamiliar, generally speaking, with the provisions, purposes, and concepts of community property laws even though they are in effect in twelve states and in Hawaii.

Points and Argument

I. *Provisions of California Community Property Law Affected by This Decision Require Determination of Character of Property, i.e., Whether Community or Separate.*

(a) Definition of community property.

The method pursued by California in defining community property is what might be regarded as a reverse approach. Separate property of the wife is defined in Section 162 of the Civil Code of California as:

> "All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property."

Separate property of the husband is defined in Section 163 of the Civil Code as:

> "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property."

Community property is thereupon defined in Section 164 of the same Code as:

> "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State is community property. . . ."

It thus becomes apparent that under the California definition of community property the earnings of either hus-

band or wife during marriage and the accumulations or result of the investment of such earnings is community property.

(b) Relationship of husband and wife as to management and operation of community property.

Section 172 of the Civil Code of California provides:

> "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration. . . ."

The provisions with reference to the management of *real property* are not involved in this case and hence will not be quoted although we may say this matter is covered by Section 172a of the Civil Code of California.

(c) Community property provisions take the place of courtesy and dower.

California Civil Code, Section 173, provides:

> "No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband."

This section we believe is significant for the reason that it emphasizes the fact that the community property laws are intended to provide for the wife the same type of security for support and care upon her husband's death as is granted by dower or similar statutes in other states. This fact makes it even more difficult to distinguish this case from the cases involving alimony and support.

(d) *Entire basis of state law for determining wife's rights in case of divorce requires definite determination as to whether property is separate or community.*

Section 141 of the Civil Code of California provides as follows:

> "In executing the five preceding sections the court *must* resort (1) *to the community property* then (2) to the separate property of the husband". (Emphasis ours.).

The five sections referred to in Section 141 just mentioned are as follows:

California Civil Code, Section 137:

> "When an action for divorce is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, as the case may be, or to prosecute or defend the action. When the husband or wife wilfully deserts the wife or husband, as the case may be, or when the husband or wife has any cause of action for divorce as provided in Section 92 of this Code, he or she may, without applying for divorce, maintain in the superior court an action against her or him for permanent support and maintenance of himself or herself or of himself and children, or of herself and children. When the husband wilfully fails to provide for the wife, she may, without applying for divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children. When a father wilfully fails to provide for his children, the mother of the children may, without applying for a divorce or maintenance for herself, maintain in the superior court an action against him solely for the support and maintenance of the children. During the

pendency of any such action the court may, in its discretion, require the husband or wife, as the case may be, to pay alimony or as costs of action or as attorney's fees any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court. The court, in granting the husband or wife permanent support and maintenance of himself or herself or of himself and children or herself and children, in any such action, shall make the same disposition of the *community property* and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction. (This refers to provisions of Section 146 of the same Code hereafter quoted.) The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court." (Emphasis ours.)

California Civil Code, Section 137.5:

"In all actions for divorce or annulment or separate maintenance in which the court grants to the wife or husband, as the case may be, attorney's fees in the prosecution or defense of the action, as the case may be, such fees may, in the discretion of the court, be made payable, in whole or in part, to the attorney entitled thereto, and judgment may be entered and execution levied accordingly."

California Civil Code, Section 138:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same. . . ."

California Civil Code, Section 139:

> "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects. . . ."

California Civil Code, Section 140:

> "The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case."

It appears to us that these sections alone make clear the fact that the essence of community property is a means of securing support and care for the children, the wife, and the husband and it is of course obvious that a court must know the character of the property in the possession of the spouse—that is, whether it is community or separate, in order to carry out the above provisions of California law.

These are not the only provisions of California law making it essential that the character of the property of the spouse—that is, community or separate, be determined. Section 142 of the Civil Code provides in part as follows:

> "When the prevailing party in the action has either a separate estate, or is earning his or her own livelihood, or there is community property sufficient to give him or her alimony or a proper support, or if the custody of the children has been awarded to the other party, who is supporting them, the court in its discretion, may withhold any allowance to the prevail-

ing party out of the separate property of the other party. . . ."

Section 146 of the California Civil Code sets up the rules for determining the disposition of community property upon the granting of a divorce. The first two subsections under Section 146 are the only ones particularly in point. They read as follows:

"One. If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the *community property shall* be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just." (Emphasis ours.)

"Two. If the decree be rendered on any other ground than that of adultery, incurable insanity, or extreme cruelty, the *community property shall* be equally divided between the parties." (Emphasis ours.)

Section 147, California Civil Code:

"The court, in rendering a decree of divorce, *must make such order for the disposition of the community property,* and of the homestead, as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds." (Emphasis ours).

(e) *The determination by the court of the character of the property of a deceased husband, i. e. whether community or separate, is a basic necessity under the California Probate Code.*

The following sections of the Probate Code of California make this clear.

Section 201: "Succession. Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse, the other half is sub-

ject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of Sections 202 and 203 of the Code."

Section 201.5: "Personal Property. Upon the death of either husband or wife, one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code."

Section 202. "Subject to debts, etc.: Death of Wife. Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; . . ."

Section 203. "Husband's Power Over Community Realty: Notice of Claim of Interest. After 40 days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property. . . ."

Other provisions of the California Probate Code provide for the succession to *separate* property and these provisions also require the court to determine what is separate and what is community.

As the Court will note, all these provisions, whether related to divorce or death, apply with equal force to the husband and wife. Naturally it is entirely possible that the determination of the character of veterans insurance—that is, whether community or separate, is not confined to

cases where the insured is the husband as many women members of the armed forces also carry such policies and we may well have a situation where a woman who is a former member of the armed forces carries an insurance policy on her life on which all of the premiums are paid out of community accumulations consisting entirely of the husband's earnings. It is apparent that the Court's decision in this case would likewise deprive such a husband of any interest in the proceeds of the policy if the wife chose to defraud him by giving away the community property.

While there are many other provisions of California law[1] making it essential for the owners of property and the courts of this state to know whether property of the spouse is community or separate, we believe the quoted code sections amply demonstrate this fact.

II. *The Court's Opinion in This Case Leaves in Doubt the Question of Whether or Not Veterans Insurance Policies and Their Proceeds Are Community Property or Separate Property.*

We present this discussion because, even though the Court adheres to a decision against our contention on the issues involved in this matter, *it is essential for the purpose of avoiding confusion in the laws of community property states that the Supreme Court clearly decide either that a National Service Life Insurance Policy and its proceeds are community property or that they are separate property.*

A careful and repeated analysis and study of the opinion leads us to the conclusion that it cannot be determined with any reasonable assurance whether the Supreme Court intends to hold (a) that the Veterans insurance policy and its proceeds are separate property and therefore the wife

[1] Undoubtedly the community property laws of the eleven other community property states and Hawaii contain similar provisions.

has no interest therein or (b) that the Veterans insurance policy and its proceeds are community property but Congress immunized the policy and the proceeds against any claims of the wife.

On page 2 of the opinion the Court assumes (and it is of course admitted by the pleadings) that the pay of a soldier is community property. On the same page the Court states that "Major Wissner's army pay . . . was the source of the premiums paid on the policy."[2]

In other words, it is conceded by the Supreme Court and everyone else that the soldier, without the consent or knowledge of the wife, purchased a contract from the federal government with community funds. The Court does not, and we believe cannot, deny that the wife's half interest in the earnings was vested.

On page 2 of the opinion, the Court continues as follows:

> ". . . the Court (California) concluded that the proceeds 'were and are the community property' of the widow and the decedent and entered judgment for appellee for one-half the amount of payments already received plus interest and required appellants to pay appellee one-half of all future payments 'immediately upon the receipt thereof' by appellants or either thereof. The District Court of Appeal affirmed (89 Cal. App. 2d 209, etc., Pacific 2nd 1949) holding that appellee had a 'vested right' to the insurance proceeds and the Supreme Court of California denied a hearing, one Judge dissenting."

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[2] Some lose statements may appear in the briefs on both sides to the effect that premiums were paid from army pay but the record before this Court contains no such statement. Our complaint alleged that "the premiums on said insurance policy above referred to and the whole thereof were paid from the earnings of the said Leonard O. Wissner" (Tr. 3). The defendants' answer alleged that the premiums were paid by deductions from the pay of Wissner as an officer in the army (Tr. 8). The lower Court found in exact accordance with the allegation of our complaint (Tr. 13).

The opinion of this Court then says:

> "We are of the opinion that the decision below was incorrect."

It cannot be ascertained from this statement in what particular the judgment of the lower court is incorrect. We contend that if the Supreme Court intended to say that the policy and its proceeds are not community property, it is essential, to avoid confusion, that this be said simply and clearly.

Following the last quoted excerpt from the opinion is a discussion of the fact that the National Service Life Insurance Act is a system of insurance for members and veterans in the armed forces; that premiums are low; that under certain conditions they are waived; that costs of administration are borne by the United States, and the liability may be discharged out of Congressional appropriations.

So far as we can understand the basic problem here under discussion, none of these considerations are relevant. None of them affect the character of the property (insurance contract) purchased by the serviceman, i. e. as to whether it is community or separate, and certainly none of them deprive the wife of her rights. *Lynch* v. *U. S.*, 292 U. S. 571, holding the contract is property and gives rise to vested rights.

The opinion points out that the soldier has the right to designate the beneficiary or beneficiaries of the insurance and the right to change such beneficiary. From this clause of the Act, and apparently from no other, the opinion of this Court concludes "thus Congress has spoken with *force* and *clarity* in directing that the proceeds *belong to the named beneficiary and no other*. (Emphasis ours.)

We do not find either in the beneficiary clause of the Act or elsewhere any enunciation by Congress that the pro-

ceeds of insurance "*belong to the named beneficiary and no other*". We suggest that this statement is incorrect under existing decisions that were not questioned by this Court. For example, it has repeatedly been held in the federal courts that even though the serviceman names a woman whom he believes to be his wife as beneficiary, the determination of whether or not she is his wife must be left to the law of the state of marriage. *Brown* v. *U. S.*, 164 Fed. (2d) 490; *U. S.* v. *Laton*, 68 Fed. Supp. 247; and *U. S.* v. *Robinson*, 40 Fed. (2d) 14.

Again, there are many cases holding that when the beneficiary has received the proceeds and invested them, they lose all protection and can be taken under any appropriate claim.

If it can reasonably be said that the enunciation of Congress that the soldier has the right to *designate the beneficiary* and to *change the beneficiary* is speaking with *clarity* and *force* to the effect that the wife's community property rights are destroyed or to the effect that the proceeds belong to the named beneficiary and no other, we suggest that it is unusual that three Justices of the Appellate Court of California, 6 Justices of the Supreme Court of California, and three Justices of the Supreme Court of the United States were unable to so understand the Congressional language. With all due respect to this Court, it occurs to us that with twelve Justices of various Appellate Courts taking one view of the Congressional language and five taking another view, it is not inappropriate to conclude that the phraseology of Congress is hazy and uncertain rather than clear and forceful.[3]

We suggest to this Court the language of Mr. Justice McReynolds in *Carrier* v. *Bryant*, 306 U. S. 545, 83 L. Ed.

[3] We, of course, have at all times contended that the phrase is clear and forceful until Courts seek to find a hidden meaning beyond that of the words used.

976, where he was considering Section 454a of the Act in question in this case. "We find nothing in the history or supposed purpose of the enactment adequate to support a construction not in accord with the *ordinary import* of the words employed". (Emphasis ours.)

It is a very common thing for insurance policies to provide that the insured shall have the right to designate and to change beneficiaries. (A contract of this character was before the California Supreme Court in *Grimm* v. *Grimm*, 26 Cal. (2d) 173, 157 Pac. (2d) 841.)

We submit that this phrase, or one substantially the same, is in common usage in hundreds of thousands of insurance contracts. The United States simply adopted a phrase that was not at all new to the insurance business. The designating of a beneficiary under the common meaning of the words only means that the proceeds are to be paid to that person. The company, or in this case the United States, in issuing the insurance does not contract to do anything else. The Court's opinion must necessarily add to the ordinary and common import of the phrase additional words in substance as follows: "and once the proceeds are paid to the beneficiary they shall belong to that beneficiary (whether the insured or a stranger to the community) and to no other and shall be untouchable in any manner by the wife or widow of the insured". We humbly suggest that the addition of such a sweeping clause is a job for Congress rather than for the Court.

The Court then observes that the mother was the beneficiary Congress directed *shall receive* the insurance money. This statement is in accord with our theory. Both the soldier and Congress directed that the mother should *receive* the insurance money. By naming a beneficiary under a contract that permits him to name a beneficiary, the soldier fully uses the right he has under the policy and

is assured that the mother will receive the insurance money from the United States.

The next statement in the opinion inadvertently assumes a contention on our part that we did not make. At no time did we purport to discover "Congressional purpose that widows in community property states participate in the payments". *The only thing we purported to discover and the only thing we believe can be discovered in the Act is that Congress did not show any purpose to change existing law on that subject. In other words, the Act is silent on this point and therefore does not cut off the widow's rights.*

There is no other portion of the opinion coming close to a determination of the question of whether or not the soldier's insurance policy is community or separate property other than the next to the last two sentences appearing on page five as follows:

> "The federal statute establishes the fund in issue, and forestalls the existence of any 'vested' right in the proceeds of federal insurance. Hence no constitutional question is presented. However 'vested' her right to the proceeds of nongovernmental insurance under California law, that rule cannot apply to this insurance."

It seems to us that the first sentence which we have quoted is not exactly in accord with the facts. In reality, Congress passed a law which *permitted the establishment of the fund in question through the collection of premiums from soldiers* with the government paying administration expenses. As to whether or not Congress forestalled the existence of any vested right in the proceeds of federal insurance, we can only say that this Court has determined in *Lynch* v. *U. S.*, 292 U. S. 571 (the case being cited in this opinion) that Congress did not forestall the existence of any vested right in the contract with the government or in the proceeds

of federal insurance. Here Mr. Justice Brandeis said in specific and concise words "*the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents. . . . War risk policies being contracts are property and create vested rights.*" (Emphasis ours.)

The holding of *Lynch* v. *U. S., supra,* establishes the fact that the insured and the beneficiary, who may be himself, have vested rights which cannot be destroyed by Congressional Act. This case is cited with approval in *U. S.* v. *Zazove,* 334 U. S. 602, 92 L. Ed. 1601, where in a unanimous opinion considering the interpretation of Section 602-h of the National Service Life Insurance Act of 1940, at page 611 of U. S. or 1607 of L. Ed., footnote 12, it is said:

> "*This is not, of course, to deny that the statute and regulations adopted pursuant to it give rise to an obligation that has the force of a binding contract with the serviceman insured*", *citing Lynch* v. *U. S., supra, as authority.* (Emphasis ours.)

The Court in the opinion in the present case concludes that because "the federal statute . . . forestalls the existence of any 'vested' right in the proceeds of federal insurance", California courts have no control over the property rights of their citizens where those rights involve a National Service Life Insurance policy or its proceeds.

In view of the holding in *Lynch* v. *U. S.*, and the statement made in the *Zazove* case just referred to, we respectfully suggest that since the husband, upon purchasing the insurance policy from the United States with funds belonging equally to himself and wife, acquires a vested right to the benefits contracted for in the policy, namely, disability payments if he is disabled or the proceeds if he names himself as beneficiary; it seems to require at least a modicum

of legal legerdemain to establish that the wife whose money is used by the husband does not likewise acquire a vested right.

As we indicated in the beginning of this portion of our discussion, it is our earnest conclusion that the opinion of the Supreme Court in this case leaves uncertain the question of whether or not veterans insurance policies or their proceeds are community property or separate property. The essence of the decision of the Court is that the wife is deprived of any right to claim her half of the policy or its proceeds under any circumstances because, according to the opinion, "Congress has provided . . . that the chosen beneficiary of the life insurance policy shall be during life the sole owner of the proceeds".

This conclusion can be equally well arrived at either by saying that Congress intended that the policy and its proceeds shall not be community property but shall be separate property or by saying that even though the policy and its proceeds are community property Congress intended to deprive the wife of the right to obtain her portion thereof. Naturally we do not agree with either interpretation of the Act. We are merely saying that either one of the approaches mentioned would fit in with the opinion of this Court.

III. *Failure to Determine Community or Separate Character of Policy and Proceeds Leaves State Law in Confusion.*

As we have already indicated, the determination of the character of the property is of paramount importance to community property states. We respectfully urge that those states are entitled to an opinion in this case that *clearly* and *unequivocally* says in *plain language* whether or not the Supreme Court of the United States regards a veterans

policy purchased with community funds, (whether they be soldier's earnings, wife's earnings, or proceeds from community investments) as community property or separate property.

In determining this question it is essential to keep in mind the fact that this opinion is laying down a broad rule and should not under any circumstances contemplate only the policy purchased during war time, paid for out of soldier's pay and matured by virtue of the soldier's death during the war. The opinion as now written covers every veteran's insurance policy, including the many that have been in force since World War I.

It is our belief that *many policies from World War I have been converted* and that at this time *many of them have a high cash value or will soon fall due as endowments.* We also believe that *as to many of these policies 30 or more annual premiums have been paid out of community funds, including the earnings of the husband and the wife and the proceeds of their investments, as against only two or three annual payments that may have been made out of the earnings of the husband during actual war time.*

As Mr. Justice Brandeis said in Lynch vs. U. S., "these insurance policies, being contracts, are property and create vested rights".

Since the soldier's contract is property, the courts of California and the courts of all the other community property states will constantly be confronted with the determination of the character of that property, whether community or separate, in order to put into effect the laws providing for the division of property between men and their wives in divorce actions, the use of the property of the spouse for support and maintenance, the property that may be resorted to for the payment of separate and community debts, the right to succession, and many other problems that are so

integrated with the laws of community property states it is impossible to segregate them.

For example, a soldier in World War I converted his insurance, named himself beneficiary, and now elects to collect the cash value, which may be several thousand dollars, and may be the only property of the community. He holds the money in the bank and does not invest it. If the opinion in this case as now written stands, the Courts in California must be controlled by it in determining whether or not this fund created by the investment of the soldier under the Congressional Act here in question is community property or separate property.[4] Until that question is decided and determined, the hands of the state courts will be tied and no effective disposition can be made of the property.

IV. *Logical Analysis Shows That None of the Provisions of the Act Relied on Support the Majority Opinion of the Court.*

As nearly as we can understand the Court's opinion, three provisions of the Act in question are relied on for support, namely, the provision giving the right of naming or changing beneficiary, the provision providing that no person shall have a vested right, and the provisions of Section 454a relative to exemption from claims of creditors.

(a) *Right to Name and Change Beneficiary.*

The language of the Act in this regard, as hereinabove pointed out, is quite simple and would seem to be reasonably easy to interpret without adding any ruffles or frills to it. The contract merely says that the soldier "shall have the right to designate the beneficiary or beneficiaries of the

[4] The opinion as now written says the wife cannot obtain either her share of the identified fund or an equivalent amount (Opinion pages 3-4).

insurance . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries." Since we have referred to this provision in the last section of our argument, we do not intend to discuss it in detail again except to say that the right to name or change beneficiary has a very common, ordinary, and well understood meaning and that if the ordinary meaning of these words is to be enlarged to mean, as the Court says, that "the proceeds belong to the named beneficiary and no other", it obviously adds to and changes the meaning of the simple words used by Congress. How this plain unambiguous and unequivocal language can be used to destroy rights that would otherwise be recognized is not understandable to us.

(b) *No Person Shall Have a Vested Right.*

We have likewise referred to this phrase of the Act in previous portions of this petition for a rehearing but we repeat that since the Supreme Court, *Lynch* v. *U. S.*, *supra* and *Zazove* v. *U. S.*, *supra*, has recognized that a soldier either as beneficiary, if he names himself, or as the insured, if he is entitled to disability, has a vested right we cannot understand how the Supreme Court can rely on this clause to support the conclusion that the soldier's wife, whose interest in community investments under the state law is equal with the husband, has no vested right.

(c) *Proceeds Exempt From Claims of Creditors, Attachment, Levy, and Seizure.*

The Court tacitly admits that the portion of the judgment providing for a money judgment against the defendants for $882.05 plus interest is not an attachment, levy, or seizure of any part of the proceeds of the insurance. It is naturally quite obvious that this must be the conclu-

sion as this case up to the present time does not involve any attachment, levy, or seizure of any kind. That portion of the judgment covering moneys due up to the date thereof may well be satisfied out of other properties of the defendants including investments that have no relation whatever to the proceeds of the insurance. This being the situation, we fail to see how any support for the Court's opinion can be gleaned from the exemption provision so far as the portion of the judgment up to date of entry thereof is concerned. As to the remainder of the judgment, the measure of the amount awarded is an amount equal to half of the payments received by the beneficiary as pointed out by Mr. Justice Minton in the dissenting opinion. It is true that the judgment requires the defendants to pay over half of the proceeds as received. This still is not an attachment, levy, or seizure of the proceeds. If the defendants fail to live up to the judgment the normal procedure would be to obtain an execution which would be levied on any property of the defendants. If the execution was levied on their ranches or other accumulations having no relation to the proceeds of the insurance, no question involving the exemption provision would ever arise *unless it is intended by this Court in the present opinion to place a wife in a worse position than a creditor.*

Again, as we have previously pointed out, the appellants in this matter relied solely on the provisions of Section 454a, 38 USC, claiming that this section prevented the taking of the proceeds of insurance by any form of court action. This argument, it seems to us, is completely overcome by the fact that the cases which this court cites and recognizes on page 4 of its opinion have long established the rule that the proceeds of insurance are subject to court process and to levy and seizure for alimony and support of the wife and children.

The opinion of this Court obviously reflects the great difficulty of drawing any distinction between the cases with reference to alimony and support for the wife and the instant case so far as the exemption provision is concerned. *We believe that, in view of the sections of the California Civil Code which we have heretofore cited in this petition for rehearing, it will become apparent that the community property interest of the wife is created for the same purpose and is utilized in divorce and separation for protection of the wife's interest in the accumulated property and for her support and maintenance in the same manner as accumulated marital property is used under provisions of statutes of other states providing for alimony, support, and maintenance, and division of the accumulated marital property in the event of divorce and dower.*

The Solicitor General in his brief contended that the alimony cases could be distinguished because there was no element of need or destitution shown by us on the part of the appellee. We note that the Court's opinion disposes of that contention and recognizes the fact that there is no such distinction between community property interests and other provisions for division of marital property in non-community States.

It does occur to us, however, that the opinion of the Court misses the point for which we cited these cases. To repeat it here, the appellants for support of their position and *the Court for support of its opinion, rely on the exemption provision of Section 454a, which according to the argument of appellants and the decision of the Court,* goes beyond the protection of the proceeds from *claims of creditors and like debts.* We cited alimony cases and similar cases to show that this contention is not sound. The Court's opinion recognizes the cases which hold that the exemption section does not go beyond claims of creditors and other similar debts,

hence it appears to us to be illogical to say, as the opinion of the Court does on page 5, "our view of those cases, whatever it may be, is irrelevant here". If this Court believes those cases are correct in their position that the exemption clause applies to claims of creditors and other similar debts but does not cut off family rights, then it appears to us to be wholly illogical to say that the wife's community property right is eliminated by the exemption provision. No one can or will assert that her claim is a creditor's claim or debt. We believe no one can or will deny that her claim is a marital claim and cannot be distinguished from alimony or support on any logical or reasonable basis.

Incidentally, we here call attention to the statement found in the opinion on page 5 to the following effect: "further, Congress has provided in the National Service Life Insurance Act that the chosen beneficiary of the life insurance policy shall be during life the sole owner of the proceeds". We have been unable to find any such provision in the National Service Life Insurance Act. The nearest approach to this statement is the provision that the beneficiary shall receive the proceeds from the government and that they shall be exempt in the hands of the beneficiary up to a certain limited point. The cases have extended this exemption only to the funds themselves while in the hands of the beneficiary or while on deposit in a bank, hence if the funds are invested in a government bond or a promissory note, the owner can be divested of their ownership by a creditor and, as previously pointed out, the chosen beneficiary of the soldier may never have any right to or ownership in the proceeds because state law must be invoked to determine whether or not that beneficiary falls within the classes of selected beneficiaries. In this situation the courts have no difficulty in recognizing the fact that the soldier's choice will be nullified.

V. *Participation of the Office of the Attorney General of the United States in this Litigation*

Since I received the opinion of the Court in this case and observed that it was written by Mr. Justice Clark, I made some inquiries to determine what occasioned the appearance of the United States against us on the application of the appellants for a hearing in the Supreme Court of California. The Assistant United States Attorney at Sacramento, California, appeared against the widow, Margaret Wissner, and filed an *amicus curiae* brief in support of the application for a hearing by the California Supreme Court after decision by the District Court of Appeal. At the time I was in Washington arguing this case I did not realize that Mr. Justice Clark, as United States Attorney General, through his office in Washington, had ordered the Assistant United States Attorney General to appear against the widow in this particular litigation.

I was certainly remiss in failing to connect the opposition of the United States with Mr. Justice Clark as the former Attorney General. In this regard I can only say that I did not fully understand the procedure and did not at that time have in mind that the office of the United States Attorney General in Washington during the term of Justice Clark directed the appearance against us by its representatives in California. I am very sure this situation did not occur to Mr. Justice Clark. He undoubtedly had no memory of his office having been on the opposite side of the matter in the California Supreme Court.

It appears, however, that the policy of that office under his direction was to appear and oppose widow's claims in cases of this kind. I now recall that similar opposition by the office of the United States Attorney General occurred in the case of *Nobels* v. *Cannell*, decided October, 1948, in the Los Angeles Superior Court.

I do not wish to be understood as asserting that Justice Clark is or should be disqualified in this matter. Whether such action is required, as I understand it, is within the discretion of the Justice involved and I am frankly of the opinion that I am personally to blame for the situation arising because I neglected to inquire into it at an earlier date.

I do believe, however, that we should recognize the fact that the citizens of this country rightly hold the greatest respect for the Supreme Court of our country and the men who occupy the positions on it. It is important that there never be in the minds of laymen any question of the impartiality of the members of that court. I can most sincerely assure the Court that I would be the last to knowingly permit any situation to arise that would detract from the esteem in which the Court is held by the people. It is of course entirely possible that it would be difficult for a layman to understand that in spite of the circumstances surrounding the appearance of the United States against the widow in the Supreme Court of California and the connection of the office of Mr. Justice Clark therewith, he will be entirely impartial and fair in his consideration of the matter as a Justice of this Court. I regret that such a situation has arisen. I believe, however, that it is my duty to call it to the attention of the Court. What consideration, if any, it deserves is clearly a matter for Justice Clark. He knows the circumstances better than anyone else and I am convinced that his determination as to what, if anything, should be done will be entirely fair.

VI. *If the Provisions of the National Service Life Insurance Act Are to be Made More Drastic, it Would Seem that it Should be Left to Congress.*

It seems to us that the construction placed on the Act in question by the Court's opinion may well be an extension of the provisions of the Act by Judicial decision.

We call attention to the fact that if the Veterans' Bureau believes Congress intended this Act to destroy the community property rights of women in the twelve community property States and Hawaii, it would be comparatively simple for them to submit to Congress an amendment of the Act covering the situation. Amendments to this Act have not been infrequent and since there is such marked disagreement as to its meaning among the many Appellate and Supreme Court Justices who have considered it, there would seem to be no particular reason why the problem should not be placed before Congress in specific terms so that their intent may be expressed.

The subject never has been before Congress so far as we can determine and we think it safe to say that Congress never at any time considered the possibility that the courts might construe the Act as destroying community property rights of women.

We can easily understand that the Veterans' Bureau would not desire to pursue this course because it is almost certain that Congress would never adopt such an amendment. This, however, should not prevent the Court from refusing to extend the provisions of the Act by decision instead of leaving it to the determination of Congress.

VII. *Where Husband Wrongfully Invests Community Property, Widow is Entitled to Proceeds, Not the Amount Invested.*

On page 2 of the opinion we find this comment: "but no claim was made for the premiums. The widow sought the proceeds of the insurance". This statement leads us to believe that we did not make clear to the Court the basic concept or intent of the community property sections of the California Civil Code.

We have quoted these sections in the forepart of this petition for a rehearing but we again call attention to the

fact that community property is defined by defining separate property and then providing that all other property acquired during marriage is community. This clearly includes profits and accumulations on investments hence there is no reasonable basis for a wife to claim the funds invested rather than the proceeds.

The husband, as we have heretofore pointed out by the sections of the California Civil Code, is given the *management of the community personal property.* The relationship thus created, in our opinion, partakes more of the nature of a trust than any other similar legal relationship.

In other words, the husband has the right to hold under this control the wife's share of the community property; he has the right to invest it; he has the right to manage it; but like any trustee he must account to his wife for the results of this management, control, and investment. He cannot give the funds away or dispose of them without consideration. In other words, she presently owns one-half of the property but he is entrusted with the management of it confined however to businesslike handling of her property for the benefit of the community. To admit, as the Court does, that the widow owned one-half of the funds invested but has no right to the proceeds is completely foreign to the concept of community property law in California and we believe is likewise foreign to the intent of Congress in the Veterans Insurance Act.

When a husband gives away the property of the wife he commits a fraud, a violation of his trust as the manager of her property. As Justice Minton well said in the dissenting opinion, "I cannot believe that Congress intended to say to a serviceman 'you may take your wife's property and purchase a policy of insurance payable to your mother and we will see that your defrauded wife gets none of the money.'"

The majority opinion in the case excuses this fraud on the part of the husband and the participation of the United States in it by saying that it is possible that "possession of government insurance payable to the relative of his choice might well directly enhance the morale of the serviceman."

I suppose we might also say that the peace of mind, the enjoyment of life, and therefore the morale of the serviceman, might be enhanced by permitting him to take all of the wife's interest in the community property, or even her separate property, if he knew he had the full protection of the United States government in so doing and could thereby freely take care of a lady friend as he desired. Certainly Congress would never go to such a length. The difference is only one of degree. We doubt that Congress intended to give aid and comfort to any fraudulent activity on the part of the veteran whereby he could deprive his wife of her property. *We again call attention to the fact that in making this statement we have in mind that this opinion involves insurance policies of long standing on which practically all of the premiums have been paid from the ordinary earnings of husband and wife or the profits from community investments, as well as the short-lived policies such as the one here before the Court.*

We feel that the statement appearing in the opinion on page one to the effect that the decedent and appellee were *estranged* at the time he entered the army, or shortly thereafter, is scarcely borne out by the record before this court. The only facts concerning this matter that are in the record are found in the opinion of the District Court of Appeal of California, Third District, and particularly the portions thereof at pages 19-21 of the transcript.

These facts summarized are as follows:

Major Wissner, prior to opening the joint account with his mother, had arranged with the bank to buy bonds for him out of funds which he sent to the bank, which bonds were in his name and the name of one *Naomi Beiler*. These bonds were turned over to his *mother and father*, the appellants, who held them in their safe deposit box and turned them over to the attorney for the estate upon Major Wissner's death.

When he opened the joint account with his parents he told them to retain $250-$500 in reserve and to purchase bonds with the rest in the same manner as he had previously instructed the bank, namely, in his name and in the name of *Naomi Beiler*. The bonds were to be turned over to *the parents* for safekeeping.

The appellee and her husband, Major Wissner, had a joint bank account in which she deposited her earnings, which account he withdrew in its entirety in November, 1944. Major Wissner stopped his wife's allotment in September, 1943; in January of the same year he stated he wished his attorney could get an insurance policy away from plaintiff; in September, 1943, in a letter he mentioned Naomi and stated he wished he could find some way of forcing plaintiff to a settlement and a divorce. In October, 1943, he referred to efforts to get the pink slip to the automobile away from plaintiff and referred to exerting pressure on her. In October, 1943, he stated in a letter that he had stopped the allotment to Margaret to force her to come to terms. He also, in the same letter, stated that the pink slip to the automobile was enclosed and it would be best to have it transferred to his brother so that no one could touch it. The Appellate Court of California, at page 21 of the transcript, said that these moves on the part of the husband in the opinion of the

court were made to force his wife into a divorce and settlement to further plans which decedent was making for his future from which she was to be excluded. *Nowhere in the record is there anything to indicate that the wife recognized that they were estranged or that she attempted in any way to deprive her husband of any part of the community property. All of the facts shown in the transcript which I believe we have fairly summarized above, show that the husband was engaged in an effort to defraud his wife of all of the community property that he could possibly get away from her. That his parents were conniving with him and aiding him in turning the community property over to one Naomi Beiler by receiving the bonds made out to her and by receiving community funds to be held by them for the purchase of bonds in the name of Major Wissner and Naomi Beiler. It is of course obvious that the naming of the beneficiary in the insurance policy was for the same purpose, namely, to defraud his wife out of her share of the community property.* Whether he intended the proceeds of this insurance to remain with his mother or whether there was some understanding between himself and his mother and father that this community property was likewise to go to Naomi Beiler, we do not know as there is no evidence on the subject. It is reasonable to suppose, however, that since his parents were willing to assist him in defrauding his wife of other funds so that they might go to Naomi Beiler, they would also aid him in a similar purpose in connection with the insurance.[5]

With these facts in mind it seems to us the opinion, instead of saying that the parties were estranged, could have

[5] This set of facts would, we believe, entitle a wife to the proceeds of the policy even in Texas where the law is much narrower and requires that intent to defraud on part of the husband be shown. The facts in the transcript before this Court certainly would lead to a finding of fraudulent intent on the part of Major Wissner.

more fairly described the situation by saying that "the record showed that Major Wissner was engaged in a plan designed to defraud his wife of her community property and force her into a divorce because of other heart interests", and might well have substituted for the language at the top of page 4 the statement that the judgment below nullified the soldier's effort to defraud his wife and frustrated a deliberate effort to distort a Congressional Act to aid the fraud.

This comment on the opinion may have no particular legal weight as to the proper outcome in this case but we think it does serve to emphasize the fact that the construction placed on the Act by the majority opinion places the United States as represented by Congress in the position of aiding in a deliberate plan of fraud.

VIII. *Supreme Court Recognizes Community Property Rights in Homestead Land*

The opinion of the court cites the case of *Ruddy* v. *Rossi*, 248 U. S. 104, as authority for the statement that "however vested her (widow's) right to the proceeds of nongovernment insurance under California law, that rule cannot apply to this insurance". The case of *Ruddy* v. *Rossi* merely held that Section 4 of the Homestead Act, revised stat. Sec. 2296, comp. stat. 1916, Sec. 4551, providing that "no lands acquired under the provisions of this Act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor" was valid and that the lands could not be subjected to execution as a result of a judgment on a debt contracted prior to the patent even though the patent had issued at the time of suit and judgment. The Court, according to Justice McReynolds who delivered the opinion, regarded the question as involving great difficulties but in any event

the decision in this case had no relation to community property rights of wives.

The Supreme Court of the United States did consider that question in the case of *Buchser* v. *Buchser*, 231 U. S. 157-58, L. Ed. 166. In that case the husband made entry and acquired title to the land involved under the Homestead laws of the United States, the patent being issued December 17, 1903. Thereafter the wife died and the children of the marriage claimed an interest in the land under the community property laws of the State of Washington.

The Supreme Court of the United States held that when title to the property had passed from the United States to the homesteader, the land became subject to the laws of the state.

In so holding, the Court said "*In the present case the acquisition under the United States law is complete and that law has released its control before the state law lays hold and upon grounds in no ways connected or interfering with the policy of Congress, brings the community regime into play. The special family relations thus created are not like contracts with third persons impliedly forbidden by the Act of March 3, 1891, chap. 561, Paragraph 5. . . .*"

The reasoning in that case seems particularly applicable to the instant situation. We could just as well paraphrase the language of the Court in *Buchser* v. *Buchser* to say "in the present case the acquisition (of the proceeds of insurance policy) under the United States law is complete and that law has released its control before the state law lays hold . . . the special family relations thus created are not like contracts with third persons impliedly forbidden by the Act. . . ." This statement is almost in exact accord with our contention, namely that when all acts required by the United States under its agreement with the soldier have been completed, namely, the payment of the proceeds

to the beneficiary, the state law lays hold and further that the special family relations set up by community property law are not like contracts with third persons—that is creditors—and hence are not covered by the Congressional Act.

It was this type of relationship, namely, community property, that was being considered in *Buchser* v. *Buchser* and we think the reasoning of that case could well be applied here.

Conclusion

We earnestly believe that this case deserves further consideration by the Court in order that in its final disposition the opinion of this Court shall be so phrased as to act as an unmistakable and clear guide to the Judges of the community property states in determining the community or separate character of veterans' insurance policies and their proceeds under all circumstances.

We suggest that the tremendous number of policies involved indicates that the opinion should include a careful analysis of the problem as it relates to policies nearing maturity, which have a large cash value built up by long payment of premiums from community funds contributed by both the husband and the wife and accumulated from community investments. There are many such policies now and as the years go by the number and the value will continuously increase. Under the present opinion neither state law nor action on the part of the wife can protect her against future fraudulent acts in connection with this insurance. She must either gamble on her husband's honestly or resort to court action to prevent the payment of premiums from community funds. Neither Congress nor this Court should subject our soldier marriages to the strain of such a situation.

Finally, we urge that the high regard for the marriage relationship and its incidents which has always been one of the fundamental concepts of the American people and their representatives makes it improper to read into this Act a Congressional intent to encourage continued defrauding of wives in connection with millions of outstanding policies. The only facts before this Court show a fraudulent intent on the part of the husband and a carrying out of that fraudulent intent. We cannot believe that Congress intended to foster activities of this character. We believe the people of this country, having before them the facts as they appear in the transcript before this Court, would be affronted by an effort on the part of Congress to condone such actions on the part of the husband.

We respectfully ask that a rehearing of this cause be granted for the reasons herein set forth.

Dated at Modesto, California, February 28, 1950.

Respectfully submitted,

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